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IN THE

Supreme Court of the United States

OCTOBER TERM, 1952.

No. 650

LESTER ROTHSCHILD, individually and trading as GEN-O-PAK COMPANY,
Petitioner,

vs.

FEDERAL TRADE COMMISSION,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

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The Scheffer Press, Inc.—ANdover 3-6850

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

TO THE HONORABLE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The Petitioner, Lester Rothschild, individually and trading as Gen-O-Pak Company, prays that the writ of certiorari issue to the United States Court of Appeals for the Seventh Circuit to review the decree of that court rendered on December 9, 1952 (R. 163). A transcript of the record in the case, including the proceedings in said Court of Appeals, is furnished herewith in compliance with Rule 38 of the Rules of this Court.

SUMMARY AND STATEMENT OF MATTER INVOLVED.

This action arises on appeal from an order of the Federal Trade Commission requiring the Petitioner to

cease and desist from certain acts and practices in interstate commerce which the Commission has ruled to be unfair and deceptive. Complaint was filed by the Commission against Petitioner, charging that the Petitioner's manner of conducting his business constituted unfair and deceptive acts and practices in interstate commerce. A hearing was had on the charges, and the Commission entered a cease and desist order (R. 112, 135, 148).

An appeal was duly prosecuted to the United States Court of Appeals for the Seventh Circuit, in which court the determination of the Commission was affirmed (R. 156).

Both the Commission and the Court of Appeals failed to recognize the jurisdictional limitations imposed upon the Federal Trade Commission by the Congress and the Judiciary. The matters complained of by the Commission are not matters involving interstate commerce, except that they involve the use of the United States postal facilities in the transmission and receipt of mail by the Petitioner. As to such matters, it is the Petitioner's contention (a) that they do not constitute interstate commerce within the meaning and intendment of the Federal Trade Commission Act (52 Stat. 111-112; 15 U.S.C., Section 45(A)), and (b) that such acts and practices as Petitioner has engaged in in the conduct of his business, if subject to Federal regulations at all is subject to such regulation by the United States Postal Department, and not by the Federal Trade Commission.

There is further involved in this matter the serious question of whether the acts and practices complained of by the Commission are, in fact, unfair and deceptive, and whether such acts and practices may be restricted or forbidden by any Federal agency.

A complete statement of the specific facts involved in this case are contained in the brief filed in support of this petition for writ of certiorari, which brief is annexed to this petition.

JURISDICTION.

The jurisdiction of this Court arises under Title 28 United States Code, Section 1254. The opinion of the Court of Appeals for the Seventh Circuit was entered on November 20, 1952 (Rec. 156) and the Final Decree Affirming and Enforcing the Order to Cease and Desist, which Petitioner seeks to have reviewed, was entered pursuant to said Opinion on December 9, 1952 (Rec. 163).

THE QUESTIONS PRESENTED.

1. Is one who seeks information through exclusive use of the United States Mail engaged in interstate commerce so as to come within the jurisdiction of the Federal Trade Commission?

2. Whether the acts and practices by Petitioner were of such a nature as to constitute them unfair and deceptive within the meaning of the Federal Trade Commission Act?

3. Whether the Order to Cease and Desist is too broad in scope and not within the jurisdiction of the Federal Trade Commission to enter and enforce?

THE REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

The discretionary power of this Court is invoked upon the following grounds:

1. The decision of the Court of Appeals for the Seventh Circuit in holding that Petitioner was engaged in interstate commerce is contrary to the weight of authority on the subject.

2. The decision of the Court of Appeals for the Seventh Circuit in holding that the acts and practices complained of were deceptive within the meaning of the Federal Trade Commission Act is contrary to the weight of reason and authority.
3. The scope of the order of the Federal Trade Commission to Cease and Desist exceeds the authority and power conferred upon it by the Congress in the Federal Trade Commission Act and the decision of the Court of Appeals for the Seventh Circuit in ordering the enforcement of said order is in conflict with the intent of the Congress as expressed in said Act.

Wherefore, your Petitioner respectfully prays that the writ of certiorari be issued under the seal of this Court, directed to the United States Court of Appeals for the Seventh Circuit, commanding that Court to certify and send to this Court, on a day to be designated, a full and complete transcript of the record and all proceedings in the United States Court of Appeals for the Seventh Circuit had in this cause, to the end that this cause may be reviewed and determined by this Court; and that the judgment of the United States Court of Appeals for the Seventh Circuit be reversed and that Petitioner be granted such other and further relief as may be proper.

Respectfully submitted,

SAMUEL E. HIRSCH,
Attorney for Petitioner.

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FEDERAL TRADE COMMISSION,

Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I. OPINIONS OF THE COURTS BELOW.

The Initial Decision of the Trial Examiner of the Federal Trade Commission, which was approved and adopted by the Commission, appears in the record at page 102.

The Opinion of the Court of Appeals for the Seventh Circuit appears at page 156 of the record, and the Final Decree entered in pursuance of the said Opinion appears on page 163 of the record.

II. JURISDICTION.

The jurisdiction of this Court is invoked under Title 28 U.S.C., Sec. 1254. The Opinion of the Court of Appeals was entered and filed on November 20, 1952, and the Final

Decree of the Court of Appeals was entered and filed on December 9, 1952. No motion for rehearing was made.

III. STATEMENT OF THE CASE.

Petitioner is an individual who does business in Chicago, Illinois under the trade names of Gen-O-Pak Company, American Deposit System and Manpower Classification Bureau, (R. 31-32).

Petitioner, operating as Gen-O-Pak Company, sells to his customers two forms of double post-cards. One form of double post-card reads as follows:

OFFICE OF THE GEN-O-PAK CO.
139 North Clark Bldg.
Chicago 2, Illinois

DEAR FRIEND: We have on hand a package, which we will send to you if you will completely fill out the return card, giving sufficient identification to warrant our sending this package to you. We will hold same at your risk subject to your forwarding directions for thirty days and the complete information requested. There are no charges whatsoever and the package will be sent to you all charges prepaid.

Yours very truly,
THE GEN-O-PAK CO.

The return card attached to the above card reads:

MAIL THIS CARD TO US AT ONCE

OFFICE OF THE GEN-O-PAK CO.
139 North Clark Bldg.
Chicago 2, Illinois

Package Identification Number..... Checked.....
Dept. Unidentified.....
Charges..... No Charges.....

Please send package (fully prepaid) to me. My correct address and identification are as follows:

SEND THE ABOVE PACKAGE TO

Print correct name.....

Print correct address.....

Print city..... State.....

Party must be identified.

For identification I refer you to my employer, my bank, and friend.

Bank .....

Address ..... City .....

Employer .....

Address ..... City .....

Department ..... Check No.....

Friend .....

Address ..... City .....

ALL questions must be answered, or package will not be sent.

General description of myself

Color hair..... Color eyes.....

Height..... Weight..... Age.....

If married, mate's first name.....

NO POSTAGE OR ADDRESSING NECESSARY

Copyrighted 1950 by Gen-O-Pak Co.

(R. 61-62)

The second type of double post-card used is similar to the first except that it states that Gen-O-Pak Company has a package that it wishes to deliver to the person whose name and last known address appears on the attached postcard. The card requests the addressee to give the correct address of the person named so as to enable petitioner to effect delivery (R. 63-64).

These cards are sold to petitioner's customers, who in turn address them and return them to him. Petitioner then mails them to the addressees from his office in Chicago

and awaits the responses on the reply post-cards. When the reply cards are returned, he forwards them to his customers. (R. 33-34).

To those persons who return the reply cards petitioner sends three pen points having a value of from 3¢ to 6¢, and also certain advertising literature for the sale of office supplies, together with an order blank, (R. 34-35). In the year 1950 petitioner sold 44,253 post cards (identified as Commission's Exhibit No. 1, R. 61) at a gross price of $7,080.48 and sold 8,510 post cards (identified as Commission's Exhibit No. 2, R. 63) at a gross price of $936.10. In the same year petitioner received 565 orders for office merchandise totalling $639.96.

The American Deposit System is a company operated by petitioner which sells to its customers certain form letters which request the answers to certain questions regarding identification of the individuals to whom these letters are addressed. These letters are placed in envelopes addressed by petitioner's customers and are then returned to the petitioner who mails them to the addressees. (R. 42-43, 77-78). In 1950, 28,486 of these letters were sold at a value of $4,557.76. If the letters are returned by the addressees with the information therein requested, petitioner sends them three pennies and forwards the letters of information to his customers (R. 46).

Insofar as the Manpower Classification Bureau is concerned, the letters requesting information (R. 85) are sent to petitioner's customers who place them in envelopes and address them to the persons to whom they wish them sent. The letters and envelopes are then returned to petitioner who mails them to the addressees. When the letters are returned to petitioner, he copies the pertinent information therein contained, tabulates them in his files,

and sends the letters back to his customers for whatever purpose they wish to make of them (R. 47, 48). The information listed on the Manpower Classification Bureau forms is constantly being accumulated but has not as yet been sold to anyone, and no attempt has ever been made to do so.

Petitioner's principal business is the operation of a collection agency under the name "All States Credits Adjustment Company". None of the forms above referred to is used in connection with his main business.

IV. SPECIFICATION OF ERRORS.

1. The Court of Appeals for the Seventh Circuit erred in holding that the petitioner was engaged in interstate commerce so as to come within the jurisdiction of the Federal Trade Commission.

2. The Court of Appeals erred in holding that the acts and practices engaged in by the petitioner were and are unfair and deceptive within the meaning of the Federal Trade Commission Act.

3. The Court of Appeals erred in affirming and enforcing the order to cease and desist entered by the Federal Trade Commission for in that said order is beyond the jurisdiction and authority of the Federal Trade Commission to enter and enforce.

ARGUMENT.

I.

The Commission does not have jurisdiction of the subject matter hereof for in that

(a) The plaintiff is not engaged in interstate commerce within the meaning of that term as defined in the Federal Trade Commission Act, and

(b) No act of unfairness or deception was established or proved by the Commission.

(a)

The Federal Trade Commission Act (15 U.S.C.A. Par. 41, *et seq.*) provides in Section 4(b) thereof that:

> "Whenever the Commission shall have reason to believe that any such person, partnership or corporation has been or is using any unfair method of competition or unfair or deceptive act or practice in commerce * * * it shall issue and serve upon such person * * * a complaint stating its charges in that respect * * *" (15 U.S.C.A. Par. 45(b))

The term "commerce" is defined as commerce among the several states, or with foreign nations.

Petitioner's business consists of the sale of certain form post cards and letters to his customers for their use, and for such purpose as they see fit.

After these cards have been sold and delivered to his customers, Petitioner's only further connection therewith is to mail them after they have been addressed by his customers and forward to them any replies which he may receive from the addressees. This service which is rendered by petitioner to his customers does not constitute

the use of an unfair or deceptive act or practice in commerce.

Nothing passes between the states except a post card or a letter, and the mere forwarding of a request for information through the mail does not constitute commerce within the meaning of the Act. See *Federal Trade Commission* v. *Smith*, 1 F. Supp. 247 (1932), and cases therein cited.

In the *Smith* case, one of the issues was whether the respondent's employer was engaged in interstate commerce within the meaning of the Federal Trade Commission Act. Respondent was employed by a corporation which rendered certain engineering, financial and advisory services of a technical and specialized nature, to certain groups of public utilities. The Court held (page 250):

> "From what has been made to appear to the Court, it is plain that the services performed by respondent on behalf of the holding and subsidiary operating companies, and which, broadly speaking, relate to legal, engineering, secretarial, fiscal, investigatory and general advisory matters, are not such as will here avail the petitioner. Without analysing the services rendered by respondent within the foregoing classifications, I will content myself by concluding that they have to do with activities which, under authoritative decisions, are not recognized as constituting interstate commerce."

The object of the Federal Trade Commission Act is to protect a vendee against fraudulent or deceptive practices of the vendor in interstate commerce. The vendees of petitioner are in no manner deceived as to the nature of petitioner's cards and service whatsoever.

A vendor of products who misrepresents them to the public by false advertising is undoubtedly responsible for those deceptive acts, but the advertising agency, printer

or the clerical help that aid in the composition of the advertising matter, it is equally clear, are not intended to be covered by the Act. If the Act were construed so as to permit the issuance of cease and desist orders against all persons who supply the vendor with any material that may be incorporated or used in vendor's deceptive acts, the result would be the extension of the Commission's authority into practically every aspect of interstate commerce and would, in addition, place upon every person dealing with another the responsibility of seeing to it that the articles or information sold by them would not be used in contravention of the law.

All that petitioner sells is a service to his customers who are the ones who cause the post cards to be sent to the persons with whom they have had business. The petitioner is not engaged directly or indirectly in selling any product to anyone, except to his customers who are principally department stores.

It is true that petitioner solicits the addressees of his customers for the sale of pencil sharpeners and other office supplies but such acts have not been complained of by the Commission.

(b)

The case upon which the Commission and the Court of Appeals laid particular emphasis is that of *Silverman* v. *Federal Trade Commission,* 145 F. 2d 751 (1944). In that case, Silverman, operating as Commercial Pen Co., sent post cards to delinquent debtors as follows:

> "We have on hand a Prepaid Package for a party whose name appears on the reverse side of this card. Due to change or error of address and lack of identification, we cannot make delivery."

A second card stated:

> "To introduce our pens, we will mail you one of them absolutely free of charge, provided you will show it to your friends and fellow employees where you work. In order to avoid duplication, name of employer must be given. You must act promptly as only a limited number of pens will be distributed in this manner. This will be sent as soon as this request card is returned."

The Court held that the contents of both cards being factually untrue, together with the use by Silverman of the name Commercial Pen Co., which was obviously a misrepresentation of the nature of his business, were intended to deceive the recipient of the post cards, all of which constituted a swindle upon said recipients.

The case at bar presents an altogether different situation. The names under which the petitioner does business do not and cannot tend to deceive or misrepresent the nature of his business. The case before the Court may be further distinguished upon the ground that every statement made by the petitioner is factually true and correct. The theory of the Court of Appeals in this case seems to be that statements which are factually true can be the basis of a charge of deception and unfairness. No court has ever gone so far as to uphold such a theory, and it would be unique indeed in American jurisprudence if such a theory were to gain favor and support at this time.

The only basis of the Commission's action herein is that the post cards are used in interstate commerce. The fact is, however, the only transactions crossing state borders occur through the use of the United States Mails. This being so, it is entirely within the province of the Post Office Department to investigate such acts and upon proper hearing and proof thereof, deny to petitioner the use of the mails; all of which is adequately provided for in the United States Postal Regulations.

It is significant that in the instant case, although the petitioner has been engaged in this business for approximately four years and has mailed many thousands of the post cards and letters about which the Federal Trade Commission complains, the Commission was unable to furnish a single witness to state that he had actually been deceived by the acts of the petitioner. Notwithstanding this lack of evidence, the Commission and Court of Appeals substituted their judgment for the actual fact and concluded that the practices of the petitioner did tend to deceive, whereas in fact no actual deception was or could be demonstrated.

II.

The order of the Federal Trade Commission to cease and desist (R. 148) which was affirmed by the Court of Appeals requires the petitioner to refrain from:

> "Using, or placing in the hands of others for use, any stationery, in connection with the locating of delinquent debtors or the collection of money due by a delinquent debtor, containing respondent's name, or any trade name used by him unless the words 'collection service' appear immediately in connection with or in conjunction therewith in type of like or equal size."

This restriction is so broad as to require the use of words "collection service" even though it would appear from the contents of the stationery used that the obvious purpose was to locate a delinquent debtor and effect collection of a debt. The Federal Trade Commission may not impose any greater restriction on the petitioner in the conduct of his business than is or may be imposed upon any other business of like kind and nature. To require the petitioner to use the words, "collection service" even though there are and could be no contention of deception or fraud is beyond the powers of the Commission.

Title 15 U.S.C. Sec. 45 (b) provides in part that:

> "If upon such hearing the Commission shall be of the opinion that the method of competition or the act or the practice in question is prohibited by * * * this title, it shall make a report in writing * * *and shall issue and cause to be served on such person, partnership or corporation an order requiring such person, partnership or corporation to cease and desist from using such method of competition or such act or practice."

Under the foregoing authority, the Commission may only require the petitioner to cease and desist from the practices about which it filed a complaint. There is nothing in the Act which authorizes the Commission to require any person to do any affirmative act, such as using the words, "collection service" on his stationery. The Commission is limited to the prevention of unfair methods of competition and the use of fraudulent acts and practices in commerce. It may not affirmatively prescribe the method of operating a business which is exactly what it seeks to do in this particular case.

CONCLUSION.

This Court is respectfully requested to issue its writ of certiorari to review or supervise these proceedings on the grounds set forth in the petition and argued in this brief.

Respectfully submitted,

SAMUEL E. HIRSCH,
Attorney for Petitioner,
Lester Rothschild, Individually and Trading as Gen-O-Pak Company.

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No. 650

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v.

FEDERAL TRADE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE FEDERAL TRADE COMMISSION IN OPPOSITION

OPINION BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit (R. 156) is reported in 200 F. 2d 39.

JURISDICTION

The judgment of the Court of Appeals was entered on November 20, 1952 (R. 162) and not on

December 9, 1952, as petitioner alleges (Br. 5-6). The petition for a writ of certiorari was filed on March 9, 1953. The jurisdiction of this Court is invoked under 28 U.S.C. 1254.

QUESTIONS PRESENTED

1. Whether the petition for a writ of certiorari was filed in time.

If question 1 is answered affirmatively, the following additional questions are presented:

2. Whether petitioner, in the conduct of his business of obtaining information about delinquent debtors, had engaged in unfair and deceptive acts and practices by representing that information about such debtors was sought to enable him to deliver packages or money being held for them, or to survey employment conditions, when in fact such information was sought to be turned over to their creditors.

3. Whether petitioner engaged in interstate commerce in conducting such business.

4. Whether the Commission was justified in prescribing the relief ordered as necessary to prevent continuation or repetition of petitioner's illegal practices.

STATUTES INVOLVED

Section 5 of the Federal Trade Commission Act, 38 Stat. 717, as amended by the Act of March 21, 1938, 52 Stat. 111, 15 U.S.C. 45, provides in part as follows:

> (a) Unfair methods of competition in commerce, and unfair or deceptive acts or prac-

tices in commerce, are hereby declared unlawful.

The Commission is hereby empowered and directed to prevent persons, partnerships, or corporations * * * from using unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce.

28 U.S.C., Supp. V, 2101 (c) provides as follows:

Any other appeal or any writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree. A justice of the Supreme Court, for good cause shown, may extend the time for applying for a writ of certiorari for a period not exceeding sixty days.

STATEMENT[1]

The Federal Trade Commission, after full administrative proceedings unchallenged as to regularity,[2] found that petitioner had engaged in unfair and deceptive acts and practices in commerce in violation of Section 5 of the Federal Trade Commission Act, and entered a cease and desist order. On petition for review of that order, the Court of Appeals for the Seventh Circuit unanimously up-

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[1] The facts relating to the timeliness of the filing of the petition are set forth in the argument, *infra*, pp. 7-8.

[2] Hearings were held (R. 30-60) on the Commission's amended complaint (R. 13), the examiner filed an initial decision (R. 102), petitioner appealed therefrom to the Commission and filed a supporting brief (R. 115), and the Commission heard oral argument (R. 135).

held its validity. The material facts, as found by the Commission[3] and the court below, are as follows:

Petitioner sells services and literature used in obtaining information about delinquent debtors (R. 135, 139, 156). He supplies printed double post cards and letter questionnaires which he mails from Chicago, Illinois, to his customers located in various states (R. 103, 135-136, 146). These customers address the cards and letters to debtors or to persons from whom information about debtors is sought, and return them to petitioner in Chicago, who then mails them (R. 106, 136, 146). Upon return of the completed cards and questionnaires, petitioner forwards them to his customers (R. 142, 146).[4]

Petitioner operates under the names of Gen-O-Pak Co., The American Deposit System, and Manpower Classification Bureau (R. 138, 139). The Gen-O-Pak Co. furnishes two forms of return address double post cards. One form, which is sent to debtors, states that Gen-O-Pak is "holding a package which we will send to you" upon receipt

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[3] The Commission adopted the examiner's initial decision as its decision in the case (R. 137).

[4] The court below stated that petitioner's advertising in the leading collection magazine made it "obvious" that his post cards and letters were sold "for no other purpose than to aid in making collections from delinquent debtors" (R. 159). Examples of such advertisements are: "Your Debtors are Changing Jobs and Addresses, Too—What are YOU Doing About It? For CHEAP, Fast Information on NEW Jobs and NEW Addresses", use petitioner's services (R. 69); "COLLECTORS ATTENTION! TAKE THE 'ACE' OUT OF TRACE BY LETTING THE GEN-O-PAK TWINS DO THE WORK" (R. 73).

of the attached card "with complete identification filled in" (R. 139). The return card calls for the debtor to furnish his name and address, that of his bank, his employer and a friend, and miscellaneous descriptive information (R. 140). The second form of card—sent to persons other than the debtor—requests the debtor's address so that Gen-O-Pak may make delivery of a package which it has for the debtor (R. 140-141). Persons who return the completed cards receive from petitioner a small envelope containing three pen points valued at three cents, together with advertising matter (R. 142).

Under the name of The American Deposit System, petitioner sends out a form letter which states that if the addressee completes and returns it

> we will forward to you a small sum of money deposited with us, for you, for that purpose. All questions must be answered, so we can determine if you are the proper party. [R. 145.]

Upon receiving the completed letter, petitioner sends the addressee three cents (R. 146).[5]

Petitioner also sends out a form letter under the name of Manpower Classification Bureau. This letter requests that the inclosed questionnaire be completed "so that this Bureau can properly classify the kind of work you are best qualified to per-

[5] The three pennies, as well as the pens sent to Gen-O-Pak addressees, are included in the 15 cents petitioner charges for these services (R. 139). Petitioner charges 11 cents for the Manpower Classification Bureau questionnaire (R. 49, 158).

form" (R. 143-144). No property or money is offered to people who answer this questionnaire.

The Commission found that, through the use of the Gen-O-Pak cards, petitioner had falsely represented to his customers' debtors and others that such debtors were consignees of packages "of substantial value" which petitioner, in the usual course of his business, was holding for delivery but could not deliver "because of lack of identification or address" (R. 142-143); that the debtors were not such consignees (R. 143), but that petitioner had made up the packages (R. 136); that petitioner's business has nothing to do with the transportation or delivery of packages (R. 142-143); and that petitioner's "whole scheme" was that of "obtaining information by subterfuge" (R. 143). The Commission further found that the Manpower Classification Bureau letter falsely represented that petitioner was operating a labor classification bureau for the purpose of obtaining information as to manpower or employment situations in certain areas (R. 136, 147);[6] that the American Deposit System letter represented that a "reasonably substantial" sum of money had been deposited with petitioner for delivery to the debtor upon proper identification (*ibid*); and that petitioner's business, insofar as the recipients of these letters were concerned, "has nothing to do with manpower

[6] Petitioner testified that he "tabulated" the information obtained from the Manpower questionnaire, that he was "building up" a store of information for future sale to "large industrial users of labor," but that he had made no effort thus far to sell the data (R. 48-49).

classification or employment surveys and no money has been deposited" with petitioner for the debtors (*ibid*). The Commission concluded that the statements in the postcards and form letters had the "capacity and tendency" to "mislead and deceive" the recipients thereof, and to induce them to furnish information which they would not otherwise supply (*ibid*).

The Commission ordered petitioner to cease and desist from representing that money or property had been deposited and was being held by the debtors unless it had in fact been deposited and its amount or value was "accurately stated;" from using the names "Manpower Classification Bureau," "American Deposit System" or other words implying that petitioner's business was that of gathering and furnishing information relating to employment, or that of receiving and holding money; and from using any stationery in locating or collecting money from delinquent debtors unless the words "Collection Service" appeared immediately in conjunction with petitioner's actual or trade name (R. 137, 148-149).

ARGUMENT

I

On November 20, 1952—the same day on which its opinion was filed (R. 156)—the court of appeals entered a separate judgment (R. 162). This judgment "ordered and adjudged" that the petition to review "be denied, and the enforcement of the said order of the Commission is ordered"

(ibid). The petition for a writ of certiorari was filed March 9, 1953, more than 90 days after entry of that order. No rehearing was sought of the order, and no application for extension of time for filing the petition was made to a Justice of this Court. The petition was therefore untimely, and this Court is without jurisdiction to entertain it. 28 U.S.C. 2101(c).

Petitioner apparently assumed that the final decree sought to be reviewed is not the order of November 20, but a subsequent judgment entered on December 9, 1952 (R. 163; Br. 3, 5-6). We submit, however, that the second judgment "did no more than to restate what it [the court] had decided by the first one," and that the 90 day period for filing the petition ran from November 20. *Federal Power Commission* v. *Idaho Power Co.*, 344 U.S. 17, 20. The judgment of December 9, after reciting the prior proceedings, ordered that the Commission's order "be and it hereby is affirmed and enforced," "commanded" petitioner to comply therewith (R. 163), and directed him to file the usual compliance report with the Commission. Neither these slight changes in language from the November 20 judgment, nor the additional provisions commanding obedience and the filing of a report of compliance, altered the substantive effect of the earlier judgment. The controversy between petitioner and the Commission over the essential validity of the Commission's order had been "plainly and properly settled with finality" on

November 20 when the court denied the petition to review and directed enforcement of the order. *Federal Trade Commission* v. *Minneapolis-Honeywell Regulator Co.*, 344 U.S. 206, 212.[7]

In the *Minneapolis-Honeywell* case, *supra*, the court of appeals had entered on July 5 a judgment which reversed Part III of a Trade Commission order. On September 18 the court entered another judgment captioned "Final Decree" in which it repeated its reversal of Part III in the language of the earlier decree, and affirmed and enforced the other two parts of the order. The Government petitioned for certiorari, seeking review of only that portion of the order reversing Part III. The petition was filed more than 90 days after the first order, but within 90 days after the second order. This Court held that the petition was untimely. It pointed out that the controversy between the parties related only to matters which had been "put to rest" by the July 5 judgment, and that accordingly "we cannot ascribe any significance, as far as timeliness is concerned, to the later judgment" (pp. 212, 213). The Court deemed it immaterial that the later judgment was captioned "Final Decree," since "the question of whether the time for petitioning for certiorari was to be enlarged cannot turn on the adjective which the

[7] The court's subsequent order of December 12 (R. 165) merely stayed the mandate pending application for a writ of certiorari. Rule 25(b), Rules of the United States Court of Appeals for the Seventh Circuit.

court below chose to use in the caption of its second judgment" (p. 212).

We submit that similar reasoning compels the conclusion that the time for filing in the instant case was not extended by the December 9 judgment, and that the petition is untimely.

II

A. Petitioner contends that his practices were not unfair or deceptive because all of the statements in his postcards and letters were true (Br. 13). In the first place, as the Commission found, petitioner made a number of false statements. Thus, contrary to petitioner's representations, no sums of money had been deposited with American Deposit Co. for forwarding to debtors, Gen-O-Pak Company was not holding any packages which it was unable to deliver because of missing addresses, and the Manpower Classification Service was not seeking information from debtors in order to classify the kind of work they were best qualified to perform. But even assuming *arguendo* that petitioner's isolated statements were all literally true, that would not negate the Commission's finding of deception. For, as the court below pointed out, "Words and sentences may be literally and technically true, and yet framed in such a setting as to mislead or deceive." (R. 160). *United States* v. *95 Barrels of Vinegar,* 265 U.S. 438, 443; *D.D.D. Corp.* v. *Federal Trade Commission,* 125 F. 2d 679, 682 (C.A. 7); *Bockenstette* v. *Federal Trade Commission,* 134 F. 2d 369, 371 (C.A. 10); *Sebrone Co.*

v. *Federal Trade Commission,* 135 F. 2d 676, 679 (C.A. 7).

Had petitioner's cards and letters stated that the requested information was to be supplied to creditors, and that the benefit to be received upon completing the questionnaire was worth precisely three cents, we doubt that many of the addressees would have furnished the data. The substantial number of persons who completed the questionnaires [8] shows how effective petitioner's misleading and deceptive statements have been in inducing delinquent debtors unwittingly to provide their creditors with the information. Plainly, the overall effect of petitioner's literature was to mislead and deceive the recipients thereof, and to "trap delinquent debtors" (R. 160). [9] Contrary to petitioner's contention (Br. 11), the Act is intended to protect not just vendees, but the public generally, against deceptive practices. *Federal Trade Commission* v. *Klesner,* 280 U.S. 19, 27; see *Gulf Oil Corporation* v. *Federal Trade Commission,* 150 F. 2d 106, 108 (C.A. 5). [10]

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[8] In 1950 petitioner sold 44,253 sets of the Gen-O-Pak cards sent directly to debtors (R. 37, 157) and 28,486 American Deposit System letters (R. 43, 159). Approximately 30 percent of the Gen-O-Pak cards and 37½ percent of the American Deposit System letters were completed and returned to petitioner (R. 36, 47).

[9] The fact, pointed to by petitioner (Br. 14), that the Commission produced no witnesses to testify that they had been deceived is immaterial. *Bockenstette* v. *Federal Trade Commission,* 134 F. 2d 369, 371 (C.A. 10); *Charles of the Ritz Distributors Corporation* v. *Federal Trade Commission,* 143 F. 2d 676, 680 (C.A. 2).

[10] The Commission's power to prohibit "unfair or deceptive acts or practices," which was added to Section 5 by the

The Commission's power to proscribe similar "skip-tracer" schemes for obtaining information about delinquent debtors has been sustained by the courts of appeals for the Second,[11] Ninth,[12] and District of Columbia circuits[13]—all the other circuits in which this question has been litigated.

B. Petitioner further argues that he is not engaged in interstate commerce because he does no more than use the mails to request information. But "petitioner's services go beyond the mailing of a request for information" (R. 160). Petitioner also sends the cards and letters to his customers outside Illinois for addressing, forwards the completed questionnaires to them, and sends out the pen points and pennies to those answering the questionnaires. In short, petitioner's "skip-tracer" business is necessarily operated in interstate commerce. The fact that such business involves the use of the mails does not deprive the

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Wheeler-Lea Act (52 Stat. 111) in 1938, authorizes the Commission to stop practices "unfair or deceptive to the public generally * * *." S. Rep. No. 221, 75th Cong., 1st Sess., p. 2.

[11] *Dejay Stores* v. *Federal Trade Commission*, 200 F. 2d 865 (C.A. 2) (request for information from "Personnel Management Bureau"; package or letter being held for delivery).

[12] *Silverman* v. *Federal Trade Commission*, 145 F. 2d 751 (C.A. 9) ("General Forwarding System" holding prepaid package; "Commercial Pen Co." seeking to introduce pens on market); *Lipman* v. *Federal Trade Commission*, 148 F. 2d 823 (C.A. 9); *Bernstein* v. *Federal Trade Commission*, 200 F. 2d 404 (C.A. 9) ("Business Research, Washington, D. C." requesting information "to enable us to complete our records").

[13] *Bennett* v. *Federal Trade Commission*, 200 F. 2d 362 (C.A. D.C.) ("The National Service Bureau, Washington, D. C." will forward "check for a small sum of money deposited with us for you;" ten cent check sent).

Commission of jurisdiction. *Branch* v. *Federal Trade Commission,* 141 F. 2d 31, 34 (C.A. 7); *Progress Tailoring Co.* v. *Federal Trade Commission,* 153 F. 2d 103, 105 (C.A. 7).

C. Finally, petitioner argues (Br. 15) that the Commission's power is limited to prohibiting the "practices about which it filed a complaint," and that it can not require petitioner to append the words "Collection Service" to his own or any trade name on any stationery used in locating or collecting money from delinquent debtors. But "the Commission is not limited to prohibiting the illegal practice in the precise form in which it is found to have existed in the past," *Federal Trade Commission* v. *Ruberoid Co.,* 343 U.S. 470, 473. "The Commission has wide discretion in its choice of a remedy deemed adequate to cope with the unlawful practices * * * judicial review is limited * * * to ascertaining whether the Commission made an allowable judgment in its choice of the remedy." *Jacob Siegel Co.* v. *Federal Trade Commission,* 327 U.S. 608, 611-612. In the light of petitioner's deceptive practices shown by the record, the Commission did not abuse its discretion by requiring him to disclose the true nature of his business in any future inquiries for information about delinquent debtors. In so doing the Commission is not affirmatively prescribing "the method of operating a business," as petitioner asserts (Br. 15), but is merely providing an adequate safeguard against continuation of petitioner's past deceptive practices.

CONCLUSION

The petition was not filed in time, the decision below is correct, no question of general importance is presented, and there is no conflict of decisions. The petition for a writ of certiorari should be denied.

Respectfully submitted,

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